ROYAL COMMISSION ON COMPENSATION FOR

NORMAN FOX

REPORT AND RECOMMENDATIONS OF THE COMMISSIONER

To: His Honour the Lieutenant Governor of British Columbia

By Letters Patent dated March 26, 1985, I the undersigned M. M. McFarlane, Q.C., was appointed pursuant to the Inquiry Act, Part 2, a commissioner to inquire into and report on the matter of compensation to be given to Kenneth Norman Warwick, otherwise known as Norman Fox, in respect of the period of imprisonment served by him consequent on the convictions made against him at Vancouver June 21, 1976, for which he was granted a free pardon by the Governor in Council on October 11, 1984, and in particular to report with recommendations on the method by which compensation should be calculated, the value of the compensation, and the form or forms the compensation should take.

Copies of the Letters Patent and of Order in Council No. 570 dated March 26, 1985, referred to therein are attached as Appendix "A".

All hearings of the Commission were held in public at The Law Courts, 800 Smithe Street, Vancouver, British Columbia, following publication of notices as required by the statute. These hearings were held on May 21, 22, 23, 24, 28, 29, and 30, and on June 4, 5, 6, and 7, 1985, in the presence of official reporters and the following counsel:

Leonard T. Doust, Esq., Q.C. and Jeffrey L. Hayes, Esq.	For the Commission
Terrence L. Robertson, Esq. and Miss Gail P. Barnes	For Norman Fox, formerly Kenneth Norman Warwick
Jack M. Giles, Esq., Q.C. and Robert J. McDonell, Esq.	For the Attorney General of British Columbia

The names of witnesses who testified and of others who presented written or oral submissions are recorded on the attached Appendix "B".

In 1968 Kenneth Norman Warwick changed his name to Norman Fox. For convenience I will refer to him hereafter simply as "Fox".

The convictions referred to in Appendix "A" made against Fox at Vancouver on June 21, 1976, were for the offences of rape, causing bodily harm with intent to wound, maim or disfigure a person, and buggery. The period of imprisonment served by him consequent on those convictions was approximately eight years and four months from June 21, 1976, to October 11, 1984. On the latter date, by order of Her Excellency the Governor General in Council (P.C. 1984-3324) Fox was granted a free pardon in respect of those offences pursuant to subsection 683(2) of the Criminal Code. The effect of that free pardon is described in subsection 683(3) of the Criminal Code which provides:

> "(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted."

I have accordingly proceeded, as I must, by accepting unreservedly that Fox never committed the offences for which he was convicted on June 21, 1976.

The event which judges and lawyers dread, and most Canadians feel all but impossible, has occurred. In spite of all the measures required by law for the protection of accused persons, the administration of the criminal laws involves participation by human beings. The system is therefore not perfect and mistakes, although infrequent, will occur.

At an early stage of the hearings, on the request of counsel for Fox, I allowed a transcript of the 1976 trial proceedings and judgment to be received as an exhibit subject to reservation of my decision as to its relevance. Having now considered this question in view of all the evidence and submissions which I have heard, I have concluded that the transcript is not relevant to the inquiry. I think this conclusion follows having regard to the subsequent proceedings by way of appeal and from complete acceptance of the effect of the pardon. I have accordingly not read the transcript.

Background and Facts Relevant to the Amount of Compensation

Fox was born August 12, 1936. In February, 1956, he was convicted of breaking and entering and theft, given a

suspended sentence and placed under bond for one year. In October, 1956, there were two convictions for theft of automobiles which resulted in concurrent sentences of six months definite and nine months indeterminate from which he was released on parole in April, 1957. On June 28, 1957, there was a conviction for theft with a sentence of two years' imprisonment which involved, of course, imprisonment in a penitentiary. On July 19, 1960, at Vancouver he was convicted of rape and breaking and entering with intent to commit an indictable offence. Sentence on the rape conviction was life imprisonment and for the breaking and entering three years' imprisonment concurrent. I shall refer to these two offences together as the 1960 offences. From the imposition of the maximum punishment permitted by law, imprisonment for life, I infer that the crime of rape was of a particularly brutal nature. Indeed, Fox himself has described it as "a terrible, violent crime" and a "violent explosion".

He commenced serving his term of imprisonment in the British Columbia Penitentiary on July 19, 1960. Following numerous applications for parole, he was eventually granted day parole on an intermittent basis on April 20, 1971, and he was granted full parole on April 13, 1972.

Meanwhile, he was married on March 27, 1972, to Lillian Ruth Hopson whom he had met in September, 1971. Shortly after his release on full parole, he became employed in various capacities including that of a gas station attendant, a labourer

at a metal foundry, a sales representative for a firm specializing in the installation of security devices and, together with his then wife, a manufacturer's representative in the wholesale clothing trade.

His efforts towards earning his living, assisted by his wife, were encouraging and moderately successful having regard to the long period of incarceration from which he had to become readjusted. His conduct as sales representative of the security devices firm earned for him the commendation of his employer, who came forward at this inquiry to speak highly of his performance, initiative and ambition. For reasons which do not reflect adversely on Fox, separation from his wife Ruth occurred in October or November, 1974. In October, 1977, she obtained a decree nisi of divorce which was made absolute in February, 1978.

In December, 1974, Fox met Trudy Harkness, then 28 years of age. She had been married at age 18; a marriage which broke down after about three years. By April or May, 1975, they were living together in a "common law" relationship which continued for about nine months until his arrest on March 24, 1976. This association with Trudy Harkness, probably following some assistance from psychiatric treatment during his 1960-1972 incarceration, has had a remarkably positive effect on the character and mental attitudes of Fox. Her loyal support of him continued during his approximately eight and one-half years of

imprisonment when she visited him regularly and almost weekly, except at times when she was travelling on business. She was also active and persistent in working with others for the pardon and release which came in October, 1984. Before that release, Miss Harkness had formed a "common law relationship" with another man. She and Fox remain good friends.

It is convenient to interrupt my chronological summary to state my findings on two items which received a good deal of attention at the hearing.

1. Counsel for Fox has urged as an important factor in assessing compensation what he described as the loss of the relationship with Trudy Harkness. He submitted that if the 1976 convictions and consequent imprisonment had not happened, "they would have married, had children and be together today." I have considered the evidence of the two principals bearing on this subject with special care. Miss Harkness by her conduct has shown her keen interest in her successful business career and has demonstrated what she described as her ability to keep the personal and business aspects of her life in separate compartments. On the whole, I cannot find that a probability of marriage and children was lost by reason of the imprisonment. On the other hand, there certainly was a change by disruption of a happy relationship. There remains a factor to be considered in arriving at the amount of compensation, though not of such importance in my view as counsel has asked me to give to it.

2. Counsel for the Attorney General elicited through cross-examination that letters addressed to parole authorities, ministers of the Crown and others by Miss Harkness and other persons were in fact composed and written by Fox. It was submitted that the evidence showed an intention on the part of both to deceive the recipients and the Commission into believing the letters were written independently by the persons who signed them. The argument centred especially, but not exclusively, on a letter signed by Trudy Harkness addressed to the National Parole Board and dated September 29, 1980. Her evidence on being recalled for further cross-examination was in effect, "Yes, the words are the words of Fox but the thoughts are mine." The way in which these letters were drafted, composed, typed, signed and dispatched was examined fully. I think the conduct of Fox and Trudy Harkness in this respect must be judged in the light of their belief, which to them was knowledge, that Fox did not commit the crime of which he had been convicted in 1976. They were convinced of his innocence and were making use of any means to establish that fact and have him released. I am not persuaded that either of them intended in the manner suggested to mislead me or anyone to whom the letters were sent.

The trial in June, 1976, resulted in conviction on all charges and sentences of ten years' imprisonment on each, concurrent with each other and concurrent with the life sentence which had been imposed in 1960. Appeal of the convictions to

the B.C. Court of Appeal was dismissed on December 1, 1976. An application to the Supreme Court of Canada for leave to appeal to that Court was dismissed. These appeals, application and dismissals alternately raised and destroyed hopes in Fox causing what his counsel described as a roller coaster of anxieties.

The prisoner's incarceration in and transfers between various penal institutions in British Columbia during the eight and one-half years before October 11, 1984, were described in detail. At probably the low point from his point of view was the period December 13, 1976, following dismissal of his appeal to April 21, 1977, spent at the Regional Psychiatric Centre. Fox was treated with contempt, abuse and threats by other inmates as a "skinner" which is prison slang for a sexual offender. For this reason, and to a considerable extent at his own request, he was often in protective custody or administrative segregation. I have no doubt that the conditions of his imprisonment were especially hard and degrading on this account. Fox testified that this aspect of prison life (protective custody and segregation) had been much less severe during his incarceration from 1960 to April, 1972. Fox was a "skinner" because of what he had done in 1960 and that fact must be regarded in part as the occasion for his being so treated from 1976 to 1984. His suffering in this respect must however be attributed substantially to the 1976 convictions and it was aggravated by his period of

release on parole for nearly four years from April, 1972, to March, 1976. A relevant factor is that during the eight and one-half years with which this inquiry is concerned, Fox persisted in asserting his innocence of the 1976 offences. The evidence is that this circumstance prevented possible psychiatric treatment and as a consequence of that fact may have delayed release on parole. On the more positive side, it is apparent Fox learned to use his abilities in attempts to improve the lot of other inmates. He was also able to attain an approximately third year university level of education. This is a worthy achievement considering that he had left school as a rebellious boy at age 15.

Efforts made on behalf of Fox to obtain an exhibit from the 1976 trial proceedings for examination by a handwriting expert were opposed by the Crown. This opposition caused a delay of about a year in obtaining the pardon. A very substantial body of psychiatric and psychological evidence was presented. Twenty-four reports written by eight psychiatrists and nine psychologists were entered among the exhibits. In addition, two psychiatrists and three psychologists were heard as witnesses. While I have considered all of this material, I think, with two exceptions to be noted, little would be gained by my reporting on it here in detail. It does show, and I accept, that Fox derived considerable benefit from psychiatric treatment before April, 1972, directed to his then antisocial attitudes and his sexual fantasies and aberrations. A large part of the reports

supported the view that there was little risk of danger to the public by granting parole to Fox during the original period of his life imprisonment. This evidence shows also a changing and maturing mental state, gradually improving personality traits and reducing risks of psychopathic behaviour. The experts are almost unanimously of the opinion that Fox is a very clever man and possesses superior intelligence.

The two exceptions mentioned supra which I think require some comment from me are:

1. A report and evidence of William R. Kelley, an Industrial Registered Psychologist, were directed to pecuniary loss of earnings attributable to the imprisonment. Tables were produced and opinions expressed in an attempt to relate to this loss obstacles in the way of a released convict seeking to re-enter the labour force in competitive times of comparative unemployment and the reducing possibilities of suspension or revocation of parole in future. I have considered this evidence to the extent that I find it to be relevant and helpful. I note that in Mr. Kelley's opinion Fox's abilities and qualities have apparently not been changed significantly by his reincarceration, that he has neither gained nor lost significant capacity for his career, that he can enter into the same career and expect the same kinds of results, but that the lost years will definitely delay his progress.

2. In the opinion of Dr. Derek Eaves, Psychiatrist, there was a high risk in 1972 that Fox would reoffend. He spoke of a changing and maturing state with the risk reducing from 1976 to 1984. His prognosis is favourable. He considered that at the present time there is a "low likelihood" of reoffending. I conclude that the likelihood of reoffending or of other causes for suspension or revocation of parole cannot be disregarded.

Fox's legal expenses related to this claim for compensation and to this inquiry are an important factor and have been taken into account. His counsel has provided this Commission with an estimate of fees of $33,000 and disbursements of $16,333.36, amounting together to $49,333.36. I make no finding as to whether that amount is fair or otherwise but have recognized that the expense has indeed been incurred.

Counsel for Fox presented a list of amounts paid by Miss Harkness covering legal fees for Fox's preliminary inquiry, trial and appeal in 1976, for services related to his pardon and her expenses of prison visiting. The total amount shown is $14,700. An obligation to reimburse her was acknowledged by Fox through his counsel. I do not think any recommendation is needed from me with respect to either of these items.

Fox was released on parole on April 13, 1972, and he continues to serve his life sentence on parole. He is a "life

parolee", subject to the provisions of the Parole Act, R.S.C. 1970, Chap. P-2 and the Regulations made thereunder. At the time of his 1976 convictions his parole was forfeited pursuant to the provisions of then section 17(1) of the Parole Act. The Parole Board was advised that upon grant of the free pardon the forfeiture was nullified. The Parole Board took the position that the free pardon cancelled the forfeiture and Norman Fox's earlier 1972 parole was revived. Consequently, a new parole certificate was issued setting out the terms of his life parole. Its terms include:

> "FUNDAMENTAL CONDITIONS OF PAROLE
>
> 1. You are to travel directly to the address as noted under instructions and report immediately to the parole supervisor as instructed thereafter.
>
> 2. You are to obtain authorization from the parole supervisor before leaving the area designated by the Board.
>
> 3. You are to inform the parole supervisor immediately if arrested or questioned by the police.
>
> 4. You are to obey the law and keep the peace."

On the evidence of Ms. B. Edwards, Regional Manager, Case Supervision of the Parole Board, I find it very unlikely that Fox will ever be allowed the status of "parole reduced" or that his parole will ever be discharged.

During cross-examination of Fox by counsel for the Attorney General, this exchange occurred:

"Q. Are you prepared to agree that if you are awarded compensation that it, that is the compensation, be made available to compensate your victim of the 1960 crime?
A Yes I am.
Q And you will agree to it?
A Yes, I just did agree to it."

Later during the inquiry, R. D. Plommer, Q.C., applied on behalf of the victim of the rape committed by Fox and for which he was convicted in 1960. Mr. Plommer asked me to hear evidence of his client under conditions which would prevent public disclosure of her residence and way of life. His purpose he said was to show the consequences of that rape on her mode of life and the extent to which it had caused her to live in fear and indeed terror ever since. He asked also that I recommend that a part of the compensation to be given to Fox should be paid to her and that I should add my recommendation regarding the amount of that part. After hearing all counsel and considering the matter, I refused Mr. Plommer's applications substantially on the ground that in my opinion he was asking me to extend the inquiry beyond the scope of my terms of reference. I stated, however, that if I thought it appropriate, after having completed public hearings on the inquiry, to do so, it would be open to me to recommend that a part of the compensation to be given to Fox should be paid to Mr. Plommer's client.

I now recommend that payment of compensation to Fox in respect of his imprisonment consequent on his convictions in

June, 1976, should be subject to the condition that he agree to the allocation of a specified part of that compensation to the victim of his 1960 offences.

To suffer eight and one-half years' imprisonment for offences which he did not commit is in itself a terrible experience. Now this is true whether or not the prisoner has been lawfully imprisoned in his past and whether or not he was serving a life sentence on parole when he was convicted.

In my judgment fair and reasonable compensation to be given to Fox in respect of the period of imprisonment served by him consequent on the June, 1976, convictions made against him is, subject to the condition stated above, the sum of $275,000.

The commission issued to me, in addition to the matter of compensation to be given to Fox, directs me in particular to report with recommendations on the method by which compensation should be calculated, the value of the compensation, and the form or forms the compensation should take. I interpret this direction as related specifically to the compensation to be given to Fox in respect of his imprisonment from June, 1976, to October, 1984. I do not think I am required to report with recommendations applicable generally to cases of free pardons granted following imprisonment. Moreover, the evidence and arguments I have heard and the reading I have done in this inquiry do not in my opinion provide a sufficient basis to

justify my attempting to recommend useful guidelines for determination of compensation in other cases more or less similar.

For reasons which I have tried to explain, I think this case is unique. The most important of the reasons for saying that consist of the 1960 offences, conviction and life sentence, imprisonment under that sentence from July, 1960, until April, 1972, followed by parole until March, 1976. This man's status as a parolee which began in April, 1972, must for practical purposes be regarded as continuing for the remainder of his life.

Comparing the circumstances of Fox with other cases confirms my view that any attempt on my part to formulate methods by which compensation should be calculated would necessarily lack any sense of reality. I have considered in particular the report made in November, 1980, by a Royal Commission appointed in New Zealand in the case of Arthur Allan Thomas. The more recent case in Nova Scotia where a conviction of Donald Marshall, Jr., was set aside by the Appeal Division of the Supreme Court of that province (1983) 57 N.S.R. (2d) 286 has been examined. Volume 2 of Report No. 1 (pp. 833-844) by an Ontario Royal Commission Inquiry into Civil Rights (1975) contains useful information regarding statutory schemes for awarding compensation to innocent persons wrongly convicted in certain European countries, the United States of America and some of its states. In the latter, an upper limit is imposed in most instances. The recommendation

of that Commission was for ex gratia payment by the Lieutenant Governor in Council on the recommendation of an ad hoc tribunal.

Even in determining the amount of an award for non-pecuniary damage in tort cases, the Supreme Court of Canada has demonstrated that it is impossible to develop a "tariff" and that an award will vary in each case to meet its specific circumstances. Damages under this head are awarded to provide some consolation or solace in consequence of a loss on which no monetary value can be put; to make some amends for pain, suffering and loss of amenities: Lindal v. Lindal, [1981] 2 S.C.R. 629.

I have found a report made in 1982 by a committee of the British Section of the International Commission of Jurists regarding compensation for wrongful imprisonment both instructive and helpful. One of its recommendations is for the creation of an Imprisonment Compensation Board. The Committee mentions guidelines and observes, "It is clearly desirable that the board should be flexible in its approach to individual cases." The report includes short descriptions of approximately 15 cases of ex gratia payments made in England. The first of these is the famous case of Adolf Beck who in 1905 was a victim of mistaken identity. After 7 years' imprisonment he was awarded four thousand pounds. The other awards described varied from three or four hundred pounds to seventy thousand pounds.

Consideration of these cases, those of Thomas and Marshall, supra, and others demonstrates an almost infinite

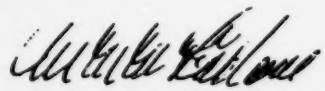
variety of relevant circumstances. I am impelled to the conclusion that it is unrealistic and impractical, if not impossible, to recommend a method by which compensation to be given to Fox should be calculated. I think the amount cannot in any real sense be calculated or computed. The only true guide in my opinion is the exercise of judgment as to what is fair and reasonable in the particular circumstances. In deciding what amount is fair and reasonable, it is necessary to have regard not only to Fox but to the taxpayers also.

Dealing with the value of the compensation, I think I cannot say more than that its purpose should be to make some amends, as distinguished from awarding damages, to assist Fox in re-establishing himself in society and to help him abide by the conditions of his parole.

My recommendation is that the compensation to be given to Fox should be given in the form of a lump sum payment. His counsel told me that a proposal for payment by way of annuity or structured settlement is not acceptable. Counsel for the Attorney General and Commission counsel expressed the view that it was not desirable. For this reason and because I consider that form inappropriate for a recipient who will continue to be serving a life sentence while on parole, I do not recommend that compensation be given in that way. I have considered also the provision at public expense of further education, either academic or vocational, and have rejected it as inappropriate for a man

who is being compensated, in part at least, for having been deprived of his freedom during some eight and one-half years.

Respectfully submitted,



Vancouver, B.C.
July 25, 1985

APPENDIX "A"

"R. G. Rogers"
Lieutenant-Governor

CANADA

PROVINCE OF BRITISH COLUMBIA

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her Other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith

In the matter of the Inquiry Act

To the Honourable M. M. McFarlane, Q.C.

WHEREAS the Inquiry Act empowers the Lieutenant Governor in Council to cause inquiry into and concerning any matter connected with the administration of justice:

A COMMISSIONER BE APPOINTED to inquire into and report on the matter of compensation to be given to Kenneth Norman Warwick, otherwise known as Norman Fox, in respect of the period of imprisonment served by him consequent on the convictions made against him at Vancouver on June 21, 1976 for which he was granted a free pardon by the Governor in Council on October 11, 1984, and in particular to report with the recommendations on the method by which compensation should be calculated, the value of the compensation, and the form or forms the compensation should take.

NOW KNOW YE THEREFORE, that reposing every trust and confidence in your loyalty, integrity and ability, We do by these presents under and by virtue of the powers contained in the Inquiry Act, and in accordance with the Order of the Lieutenant Governor in Council appoint you

HONOURABLE M. M. McFARLANE, Q.C.

a Commissioner to inquire into matters aforesaid and report your findings and recommendations to the Lieutenant Governor in Council.

IN TESTIMONY WHEREOF We have caused these Our Letters to be made Patent and the Great Seal of Our Province to be hereunto affixed.

WITNESS The Honourable Robert Gordon Rogers, Lieutenant Governor of Our Province of British Columbia, in Our City of Victoria, in Our Province, this twenty-sixth day of March, in the year of Our Lord one thousand nine hundred and eighty-five and in the thirty-fourth year of Our Reign.

BY COMMAND.

"Brian R. D. Smith"
ATTORNEY GENERAL

"James R. Chabot"
PROVINCIAL SECRETARY AND MINISTER OF GOVERNMENT SERVICES

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 570, Approved and Ordered Mar. 26, 1985

"R. G. Rogers"
Lieutenant Governor

Executive Council Chambers, Victoria Mar. 26, 1985

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders

1. A commission be issued under Part 2 of the Inquiry Act appointing the Honourable M. M. McFarlane, Q.C., of Vancouver, British Columbia as a commissioner to inquire into and report on the matter of compensation to be given to Kenneth Norman Warwick, otherwise known as Norman Fox, in respect of the period of imprisonment served by him consequent on the convictions made against him at Vancouver on June 21, 1976 for which he was granted a free pardon by the Governor in Council on October 11, 1984, and in particular to report with recommendations on the method by which compensation should be calculated, the value of the compensation, and the form or forms the compensation should take.

2. Without limiting the Commissioner's Expenses Regulation (B.C. Reg. 283/72), the Commissioner shall be paid $325 remuneration for each day he performs duties in that capacity.

"Brian R. D. Smith"
Attorney General

"James R. Chabot"
Provincial Secretary and Minister of Government Services

"W. R. Bennett"
Presiding Member of the Executive Council

APPENDIX "B"

The following witnesses were called by various counsel and gave evidence before the Commission:

1. Robert Pickell
2. Lillian Ruth Hopson
3. David Lloyd George Dryden
4. Kenneth Norman Warwick (Norman Fox)
5. Robert T. Lusk
6. Mary A. Humphries
7. Dr. Maelor Vallance
8. William R. Kelley
9. Norman Hilborne
10. Donna Ruth Hilborne
11. Trudy A. Harkness
12. Betty Lou Edwards
13. Clifford Nelson Ratzlaff
14. Dr. Derek Eaves
15. William J. Ross

Written submissions were received from the following individuals and/or groups:

1. Terry Smith
2. Lawrence J. Cook
3. Irene Schmidt
4. Alexandria Bracken
5. Citizens United for Safety & Justice
6. Prisoners' Rights Group

An oral submission was received from Victor Redman.